ORAL ARGUMENT REQUESTED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 14-1135
No. 14-1140

CONSOLIDATED COMMUNICATIONS D/B/A ILLINOIS CONSOLIDATED TELEPHONE COMPANY,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 702,

Intervenor.

FINAL REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT CONSOLIDATED COMMUNICATIONS D/B/A ILLINOIS CONSOLIDATED TELEPHONE COMPANY

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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GLOSSARY OF ABBREVIATIONS

Act	National Labor Relations Act
ALJ	Administrative Law Judge Arthur Amchan
Bd.-Br.	Citation to Board's Brief filed May 1, 2015
Board	Respondent/Cross-Petitioner National Labor Relations Board
Complaint	Consolidated Complaint filed by the National Labor Relations Board against Consolidated Communications d/b/a Illinois Consolidated Telephone Company in the underlying matter.
Consolidated	Petitioner/Cross-Respondent Consolidated Communications d/b/a Illinois Consolidated Telephone Company
Disciplined Employees	Patricia Hudson, Eric Williamson, and Michael Maxwell
GC	General Counsel
JA	Citation to the Joint Appendix
Order	Board's Decision and Order dated July 3, 2014
Union	Intervenor Local Union No. 702 International Brotherhood of Electrical Workers
Un.-Br.	Citation to Union's Brief filed May 18, 2015

I. INTRODUCTION

In an attempt to divert the focus from the Order's failings, the Board's and Union's briefs inaccurately characterize Consolidated's Petition as consisting chiefly of challenges to credibility determinations. Neither the Board nor the Union have undertaken a meaningful analysis or defense of the Order's deficiencies and instead discount the Order's flaws and hide behind off-point Board decisions and vast overgeneralizations (and often mischaracterizations) of the evidence.

The Order's errors largely speak for themselves (for instance, resolving ambiguity against the respondent on an issue in which the GC has the burden of proof, deeming a witness' testimony biased and unreliable simply because he was a manager, disregarding witness testimony based upon the unsupported assumption that they were "angry" about the strike or had animus towards an employee, and misapplying established law and the record by imposing a violence and police reporting expectations). These types of serious errors are not just throwaway statements that can be ignored, as the Board's and Union's briefs suggest. Rather, as the Order makes clear, they were the determinative reasons the Board found that Consolidated violated the Act. The Order is both contrary to law and not supported by substantial evidence and must not be enforced.

While the Board and the Union would like the Court to rubber-stamp the Order without undertaking a meaningful review,[1] this Court has recognized that it will not "merely rubber-stamp NLRB decisions[,]" but rather bears the "responsibility to examine carefully both the Board's findings and its reasoning." *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17 (D.C. Cir. 2012) (internal citation and quotations omitted).

As this Court has held, such a meaningful review includes "accept[ing] the Board's decision on its own terms, ignoring post-hoc rationalizations by counsel and rejecting the temptation to supply reasons to support the Board's decision that the Board itself has not offered." *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 311 (D.C. Cir. 2006).

When a meaningful review of the Order is undertaken in lieu of the Board's and Union's briefs' supplied post-hoc rationalizations, it is clear that the Board erred in applying established law and that the Order is not supported by substantial evidence, both of which are independent grounds requiring non-enforcement of the Order.

[1] Indeed, the Union attempts to discount this Court's role by arguing that it only has a "limited" role.

II. THE BOARD ERRED IN APPLYING ESTABLISHED LAW

A. The Board's And Union's Briefs Incorrectly Suggest That The Law Provides That Virtually Any Conduct Occurring During A Strike Is Protected

The Board's and the Union's briefs cast the right to strike as the chief right to be protected in this case. While Consolidated does not dispute that employees have the right to strike, Board precedent recognizes "Section 7 [of the Act] as clearly protects the right of an employee to refrain from taking part in a strike as it does the right of an employee to participate peacefully in one. Strikers are not protected when they engage in conduct that tends to coerce or intimidate nonstrikers in the exercise of the right not to strike, and they run the consequent risk of being lawfully denied reinstatement." *Axelson, Inc.*, 285 NLRB 862, 864 (1987).[2] It is with this overarching principle in mind that the actions should be examined, rather than the notion expounded by the Board's and Union's briefs that virtually any conduct occurring during a strike is protected, regardless of whether the conduct is peaceful and related to the lawful purposes of a strike.

[2] The Board has held that an analogous standard governs misconduct directed against supervisors. *Detroit Newspapers*, 340 NLRB 1019, 1025 (2003); *Clear Pine Mouldings* 268 NLRB 1044, 1046 n. 14 (1984).

B. The Court Should Reject The Board's and Union's Request To Expand Striker Protection To Conduct Which Clearly Occurred Outside The Confines Of Legitimate Strike Activity

1. *The Conduct Against Conley Did Not Occur In The Course Of The Strike And Was Not Ambulatory Picketing*

For the burden-shifting framework applicable to a striker misconduct case to apply, the GC must establish that the striker was discharged because of alleged misconduct "in the course of" the protected activity. *See NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964); *Shamrock Foods v NLRB*, 346 F.3d 1130, 1133 (D.C. Cir. 2003). The Board's brief attempts to justify the application of the striker misconduct standard to Hudson's conduct by asserting that Hudson's conduct was "associated" with a strike. Bd.-Br. at 17. In support, the brief cites one Board case that uses the term "associated with" in passing (*Detroit Newspapers*, 342 NLRB 223, 228 (2004)), and two other Board cases (*Consolidated Supply Co.*, 192 NLRB 982, 988-89 (1971), and *Gibraltar Sprocket Co.*, 241 NLRB 501, 501-02 (1979)) that analyze striker misconduct away from the picket line where the parties apparently never raised the issue (and thus, there was no analysis or discussion) of whether such conduct was properly evaluated under the striker misconduct standard.

There is simply no meaningful support for the Board's argument that any conduct "associated" with a strike, no matter how tangentially, is subject to the striker misconduct standard. Claiming that misconduct directed at a co-worker is

"strike activity" merely because it took place during the pendency of a strike and involved striking and non-striking employees (which could be "associated" with the strike) does not convert that misconduct into protected strike activity.

The Board's position that conduct need only be "associated with the strike" to be protected is not controlling and should not be given any weight. "The Board is not a court nor is it equal to this court in matters of statutory interpretation." *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979), *abrogation on other grounds by American Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991). "'It is emphatically the province and duty of the judicial department to say what the law is.'" *Id.* (*quoting Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The decisions of the Supreme Court, as well as the decisions of the Courts of Appeals not overruled by the Supreme Court, are binding on inferior courts and administrative agencies, including the Board. *Id.* The Supreme Court and this Court have addressed the burden-shifting framework and have explained that more than mere "association" with a protected activity is required for it to apply. *See Burnup* at 23; *Shamrock Foods* at 1133. Rather, it must be shown that "the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, and that the basis of the discharge was an alleged act

of misconduct in the course of that activity," *Burnup* at 23 (emphasis added); *see also Shamrock Foods* at 1133.[3]

The courts' requirement that the employee must be engaged in protected activity in order for the striker misconduct standard to apply makes logical sense. Otherwise, a striking employee that engages in all sorts of instances of misconduct towards a non-striking employee during the pendency of a strike would be able to blanket herself with far greater protection than the Act provides. This is precisely what happened here, where Hudson engaged Conley miles away from any strike line or picketing activity and was not undertaking any protected activity.

The cases cited in the Board's brief purportedly supporting that Hudson's conduct towards Conley constituted protected strike activity do not support the Order's conclusion. *International Brotherhood of Teamsters Local 807*, 87 NLRB 502 (1949), merely stands for the proposition that picketers can engage in ambulatory picketing at employer sites, but it is undisputed- despite the Board's and Union's efforts to dance around the issue- that Hudson did not actually engage in ambulatory picketing. *Consolidated Supply* involved distinguishable facts in

[3] The Board's brief asserts that Hudson's conduct against Conley constitutes protected activity because Consolidated investigated Hudson's conduct against Conley as part of its striker misconduct procedures. Bd.-Br. 31. However, Consolidated received numerous reports of misconduct at or near picket lines during the same approximate time, so it was only natural that it investigated the Conley incident consistent with the process it established for addressing striker misconduct. That fact should not transform Hudson's conduct into activity taken in the "course of the strike."

that the driving occurred on a private road for a short distance after the striker had followed the driver to a commercial site (i.e., actually engaged in ambulatory picketing). Regardless, the Board cannot point to any legitimate interpretation of the Act that provides that blocking someone's path on a public highway should be viewed as protected activity.[4] Apparently recognizing the weakness of the claim that Hudson engaged in ambulatory picketing, the Board's brief now refers to Hudson's conduct as "investigating opportunities for ambulatory picketing." Bd.-Br. 6.[5] Even assuming this would constitute protected activity, driving in front of someone cannot possibly have been "investigating an opportunity for ambulatory picketing."

Hudson's conduct was not committed in the course of the strike and did not constitute ambulatory picketing. As such, the striker misconduct analysis is inapplicable, and the Board has no jurisdiction to review unprotected action absent a showing of unlawful motivation. *See, e.g.*, *Neptco, Inc.*, 346 NLRB 18, 21

[4] The Board's decisions in *International Paper Co.*, 309 NLRB 31, 36 (1992), and *PRC Recording Co.*, 280 NLRB 615, 663-64 (1986), if anything, support a finding that Hudson's conduct justifies discharge. The Board in these cases upheld the discharges of employees who engaged in reckless driving, and neither decision articulates a minimum expectation for driving conduct to be unprotected.

[5] The Union argues that employees do not lose the right to strike by leaving the strike line. Un.-Br. 32. Consolidated has not argued that Hudson could not have engaged in protected ambulatory picketing after she left the strike line. However, the facts are undisputed that she never actually engaged in ambulatory picketing or any other protected activity away from the strike line but rather impeded Conley's progress and then turn around once he turned off this highway.

(2005) ("Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason or no reason at all without running afoul of the labor laws.").

2. *Even Hudson's Conduct Which Did Occur During The Course Of The Strike Was Not Properly Analyzed Under The Correct Legal Standard*

a. The Board's Brief's Post-Hoc Explanation That The Order Did Not Require Violence To Find The Activity Unprotected Is Belied By The Decision Itself

The Board's brief argues that the Order did not impose a violence standard but merely found the lack of violence "relevant." Bd.-Br. at 39. This post-hoc rationalization regarding the Order's violence analysis, i.e., that it was relevant but not a requirement, is not borne out by the Order itself. The purported lack of violence was clearly a determinative factor in concluding that the Disciplined Employees' misconduct was not sufficiently serious, as the Order expressly relied on the conclusion that Hudson did not engage in violence in finding that the Conley and Rankin incidents did not justify discharge. *See* JA 09, 10, 12-13.[6]

The Union's brief goes so far as to claim that "(i)n almost all cases, there is violence or a threat of violence." Un.-Br. 33. The Union's characterization of Board decisions is simply not accurate, as the Board has repeatedly recognized that nonviolent conduct during a strike can lose protection of the Act. *See, e.g., Detroit*

[6] The Board similarly engaged in a violence analysis as to Maxwell's and Williamson's conduct. See JA 04, 13.

Newspapers at 1030 (upholding discharge of striker who caused a mere $20 in damage to newspaper rack); *Service Employees Int'l Union, Local 525*, 329 NLRB 638, 685 (1999) ("[N]onviolent conduct, including efforts to prevent employees from reporting to work by impeding access to an employer's facility also is proscribed."); *Electrical Workers Local 3 (Cablevision)*, 312 NLRB 487, 492 (1993); *Meat Packers*, 287 NLRB 720, 721 (1987) ("It matters little that there were no incidents of actual physical violence and property damage or that the protesters did not effectively prevent individuals from passing through their midst."); *Carpenters (Reeves, Inc.)*, 281 NLRB 493, 497-98 (1986); *Metal Polishers*, 200 NLRB 335, 336 n.10 (1972) (finding that blocking cars in which nonstrikers sought to enter facility interfered with employees' rights; "the absence of physical violence does not lessen the restraining effect").[7]

Likewise, this Court has recognized that "there have been scores of cases over the years in which employers have lawfully disciplined employees for misconduct short of that which is flagrant, violent, or extreme." *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 215 n.5 (D.C. Cir. 1996); *see also Earle Indus., Inc. v. NLRB*, 75 F.3d 400, 405 (8th Cir. 1996). Although (as the Board's brief notes) *Aroostook* and *Earle* did not involve striker misconduct

[7] The fact that certain cases were in the context of unfair labor practice charges filed against a striking union does not make then inapposite, as the Union asserts. In all of these cases, the Board analyzed whether the non-violent strike activity at issue was protected and found that the activity was not protected.

per se, these decisions analyzed the bounds of protected conduct under the Act and concluded, that like here, the Board has taken a far too restrictive view of what employers must tolerate in the workplace. *See Aroostook* (in rejecting the Board's argument that the employees who were engaged in protected activity could not be dismissed unless they were involved in flagrant, violent, or extreme behavior, noting that the Act does not impose such a stringent limitation upon employers).

That the Disciplined Employees claim to have engaged in strike activity versus another protected activity does not alter the reality that the presence of violence is not the appropriate inquiry. Indeed, the Board cannot and does not cite any Board or court case establishing a violence requirement in the strike context. Yet, the Order placed the presence of violence as one of the paramount considerations in this case.[8] The Order's injection of this improper standard, which is contrary to its own decisions, warrants non-enforcement. *Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1141 (D.C. Cir. 2002); *NLRB v. Moore Bus. Forms*, 574 F.2d 835, 843 (5th Cir. 1978) ("Obviously, if the order is based on an invalid legal reason it will not be enforced.").

[8] Obviously, misconduct involving vehicles driven on public roadways could potentially be "violent" or "dangerous" conduct, as the consequences of a vehicular accident can be life-threatening to not only those involved in the incidents, but also to members of the public.

b. The Board Similarly Offers A Post-Hoc Rationalization For Its Imposition Of A Police-Reporting Requirement That Is Inconsistent With The Law

Similar to its treatment of the Order's violence analysis, the Board's brief attempts to excuse the error in imposing a police-reporting requirement by dismissing it as not a requirement but merely a relevant factor. Bd.-Br. at 25 n.5. Again, this is a distinction without a difference. The absence of police reports was "major reason" in the Order's conclusion that serious misconduct did not occur. *See* JA 06, 08, 10, 11.

There is absolutely no such legal requirement, and the Board itself has previously stated, "the Act does not require that employees exercising their right to refuse to support the strike enlist the assistance of the police to gain access to and from the plant." *Local #1150, United Elec., Radio & Mach. Workers*, 84 NLRB 972, 975 (1949). Given that the failure to file police reports was a significant reason (indeed, a "major reason" and "very significant" in the Conley incident) (JA 08), for finding that Hudson did not engage in certain of the alleged misconduct, and such a requirement is inconsistent with the law, the determination as to Hudson should be overturned.[9]

[9] The Board continues to maintain that it is important that the targets did not contact the police as they were instructed. Bd.-Br. 5-6, 25; *see also* Un.-Br. 35. This assertion is not supported by substantial evidence. Rather (as would be expected in the employment context), the specific instruction to employees was to

c. The Board's Brief's Excusal Of "Momentary" and "Impulsive" Behavior Does Not Change The Legal Standard For Which The Misconduct Must Be Analyzed

It is well-established that an employer may lawfully discharge a striker whose conduct, under all circumstances, would reasonably coerce or intimidate employees in the exercise of rights protected under the Act. *Clear Pine Mouldings* at 1046. This means that strikers do not have the right "to engage in [anything] other than peaceful picketing and persuasion." *Id.* at 1047.

While acknowledging this well-established standard, the Board's brief suggests that "momentary" or "impulsive" conduct is to be expected during a strike. Bd.-Br. 18, 29, 33, 37. Consolidated does not dispute that some "momentary' and "impulsive" conduct may occur on the strike line and not lose the Act's protection. However, "momentary" and "impulsive" behavior also can coerce and intimidate employees and lose protection. For instance, a striker punching or shooting a replacement employee as the employee crossed the picket line could certainly be "momentary and impulsive" acts, but clearly such conduct would be unprotected.

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report incidents through employer-provided channels. Specifically, Consolidated emailed Illinois non-bargaining unit employees with the following express instruction: "Report any incidents to the Command Center at [phone number]." JA 59, 232-233, 333. Thus, the unambiguous and specific instruction to non-striking employees was to report incidents to Consolidated's Command Center rather than the police, which is what the targets of Hudson's misconduct- Greider, Conley and Rankin- did. Yet, the Order completely disregards this clear evidence.

Board precedent makes clear that each case must be examined "under the circumstances existing" in that particular case. *Clear Pine Mouldings* at 1047. Not only could a "momentary and impulsive" standard be inconsistent with *Clear Pine Mouldings*, but Hudson's conduct through the day that led to her termination was not actually momentary or impulsive. The evidence shows that Hudson engaged in a course of conduct throughout the day of blocking and impeding the progress of multiple employees with her vehicle on a public highways and roads. From the beginning of the day, Hudson participated in the chaotic strike line conditions. She obstructed traffic coming into and out of the Rutledge facility, and despite the general instructions she received from the police, she continued to intentionally obstruct traffic and put herself in the way of oncoming vehicles. JA 87 at 9:09:25 (obstructing traffic), 10:18:26 (Police Chief moving her back), 11:30:32; JA 365-366, 468-469, 500-504, 509-511. Further, she engaged in three separate incidents towards Conley, Rankin, and Greider.

The intimidating and coercive nature of blocking and swerving in front of cars, including blocking a car's progress as it is attempting to pass on a public road where the speed limit is 55 miles per hour, is apparent. This conduct plainly compromises the safety of others and could in no way be considered "peaceful picketing and persuasion" under *Clear Pine Mouldings*. Indeed, Hudson's activity against Conley, which at an absolute minimum included impeding his progress on

a public highway for more than just a "momentary" moment, alone is sufficient to find that the GC did not carry its burden. *See Moore Bus. Forms* at 843 (striker "had no right to accost, pursue, block or otherwise interfere with the right of any citizen in the use of the public highway while attempting peaceably and lawfully to go to work").

The cases relied upon by the Board for the proposition that Hudson's conduct was not sufficiently serious are distinguishable. *Consolidated Supply* was issued prior to the Board's pronouncement in *Clear Pine Mouldings* of the standard for determining whether strike misconduct loses protection of the Act, and the driving incident in that case did not occur on a public highway involving other vehicles and speeds of 55 miles per hour or higher. *Consolidated Supply* at 989. Likewise, *Gibraltar Sprocket Co.,* 241 NLRB 501 (1979), and *Otsego Ski Club-Hidden Valley, Inc.*, 217 NLRB 408 (1975), were decided prior to *Clear Pine Mouldings* and did not involve similar evidence of unsafe behavior directed at an employee. The Board in *International Paper Co.*, 309 NLRB 31 (1992), upheld the discharge of an employee who engaged in reckless driving and did not articulate a minimum standard for misconduct.

C. The Board Clearly Misapplied The Established Burden Of Proof And Cannot Explain It Away

As detailed in Consolidated's Principal Brief, the Board misapplied the burden of proof. As Consolidated's honest belief is not seriously contested

(indeed, neither the Board's nor Union's briefs contested Consolidated's honest belief) and was "assumed" in the Order, the burden of proof should have shifted to the GC. *Axelson* at 864; *see also Burnup* at 23; *Shamrock Foods* at 1134; *Dallas General Drivers, Local Union No. 745 v. NLRB,* 389 F.2d 553, 554 (D.C. Cir. 1968); *Schreiber Mfg. v. NLRB*, 725 F.2d 413, 416 (6th Cir. 1984).

However, after finding that Hudson did prevent Conley from passing her (JA 08), the Order explicitly ruled "that any ambiguity" as to whether her misconduct "was serious enough to forfeit protection of the Act should be resolved against the Respondent." JA 13 (emphasis added). This is plain error and is alone grounds for non-enforcement. *See Schreiber* at 416 (concluding that the Board erred in allocation of burden of proof where it held that the employer might or might or might not have established an honest belief and then placed the burden of proving misconduct on the employer).

The Board's brief gives short shrift to this erroneous shifting of the burden of proof by making the conclusory statement in a footnote that the Order was based on factual findings, credibility determinations, and precedent, rather than on improper resolution of ambiguities against Consolidated. Bd.-Br. 35 n.8. Likewise, the Union argues that the Order recites the correct burden-shifting standard. Un.-Br. 26. However, merely reciting a legal standard is insufficient; rather, it must be applied correctly. *See Kabba v. Mukasey,* 530 F.3d 1239, 1245

(10th Cir. 2008) ("Common sense as well as the weight of authority requires that we determine whether the [Board] *applied* the correct legal standard, not simply whether it *stated* the correct legal standard.").

Here, the Order clearly failed to apply the correct legal standard and should be set aside. *See Tradesmen* at 1141; *see also Titanium Metals Corp v. NLRB*, 392 F.3d 439, 446 (D.C. Cir. 2004) ("A Board's decision will also be set aside when it departs from established precedent without reasoned justification . . . ."); *BB&L v. NLRB*, 52 F.3d 366, 369 (D.C. Cir. 1995) ("[T]he Board cannot ignore its own relevant precedent but must explain why it is not controlling.").

D. The Court Should Reject The Board's And Union's Argument That The Misconduct Must Have Precisely Matched The Exact Reasons Articulated By Consolidated

In the Order, the Board required that all of alleged incidents must have occurred for the misconduct to have lost the Act's protection. *See* JA 13 ("Respondent terminated Hudson for three incidents, not solely the Conley incident"; "Williamson's suspension was based upon two incidents"). As noted in Consolidated's Principal Brief, this is contrary to prior decisions.

Although the Board's brief seeks to downplay the Order's requirement (Bd.-Br. 34-35), the Board's and Union's briefs suggest, without any legal support, that if the employees did not engage in the precise conduct for which the Company informed them that they were disciplined, the discipline cannot stand. *See* Bd.-Br.

21-23, 28-29, 35; Un.-Br. 19, 22, 34.[10] This runs contrary to the burden-shifting framework, which provides that once an honest belief is established, the question to be answered is whether the GC carried its burden in establishing that the misconduct committed did not lose the Act's protection, not which of the myriad of employer policies it could have cited to when disciplining the employees or whether the employer set forth every detail of every incident when issuing the discipline. *See, e.g,*, *Schreiber Mfg.* at 416 ("The ultimate burden of proof was on the [GC] to show either that no misconduct occurred or that whatever misconduct did occur was not sufficiently serious") (emphasis added).

Application of the Board's and Union's suggested standard would lead to absurd results. For instance, if the employer told a striker that it was terminating her for engaging in 100 incidents of strike misconduct but she only actually committed 99 such incidents, she would have been disciplined for an "incident she did not commit." Similarly, an employer would act unlawfully by terminating a striker where it named the wrong person assaulted or believed that the striker punched rather than kicked the person, as the striker would not have been disciplined "for the conduct she committed." The Court should not accept the Board's and Union's attempt to avoid consideration of the appropriate inquiry,

[10] Here, Consolidated provided the Disciplined Employees with information prior to disciplining them, including information regarding when and where the incidents took place and the alleged targets. *See, e.g.*, JA 130-148, 196-197, 199, 203, 207, 226, 507-508.

which is whether the GC carried its burden in showing that the misconduct that did occur did not lose protection. *See, e.g., Roto Rooter*, 283 NLRB 771, 772 (1987) (after finding two of five incidents of striker misconduct did not occur, the Board considered remaining three incidents and found that encounters taken as whole reasonably tended to coerce or intimidate).

E. The Order Clearly Misapplied The Law As To Williamson

1. *The Board Committed Plain Error By Applying The Wright Line Test*

The Board committed plain error by applying the *Wright Line* test to Williamson's conduct (JA 13), which has been held by this Court and the Board as inapplicable to striker misconduct (*see Shamrock Foods* at 1136; *Siemens Energy & Automation, Inc.*, 328 NLRB 1175, 1175-76 1175 (1999)) and is completely inconsistent with the burden-shifting framework. The Board's brief attempts to minimize this obvious error by arguing in a footnote that the reference to *Wright Line's* applicability was unnecessary to the decision. Bd.-Br. 38 n.11. This is a disingenuous position, as the Order expressly applied *Wright Line* in adopting the ALJ's determination: "Williamson's suspension was based on two incidents, one of which I find did not constitute misconduct. Therefore, even assuming that Williamson's conduct forfeited the protection of the Act, I conclude that it is Respondent's burden under the *Wright Line* doctrine to establish that it would have suspended Williamson solely on the basis of the Tara Walters incident. It has not

done so, therefore I find that his suspension violated" the Act. JA 13 (emphasis added). It is clear that the Board failed to apply established law (*i.e.,* the striker misconduct standard as opposed to the *Wright Line* test) to Williamson.

2. *The Board Continues To Assert A Non-Existent Legal Standard For Threat Of Bodily Harm To Vulgar And Obscene Conduct*

The Board continues to maintain its position that for a striking employee to forfeit the protection of the Act, an implied threat of bodily harm must accompany a vulgar or obscene gesture. Bd.-Br. 37. Again, the Board is inferring a non-existent legal standard in lieu of applying the proper standard, which is whether the misconduct reasonably would tend to coerce or intimidate an employee from exercising Section 7 rights. Contrary to the Board's position, Williamson's vulgarism and obscene conduct has been recognized as the type that would tend to coerce and intimidate employees. *See Universal Truss*, 348 NLRB, 733, 780-81 (2006) (upholding termination of striker that made sexually suggestive dance towards female employee); *see also Romal Iron Works Corp.,* 285 NLRB 1178, 1182 (1987); *Bonanza Sirloin Pit*, 275 NLRB 310, 315 (1985); *GSM, Inc.*, 284 NLRB 174, 174-75.[11]

[11] The cases cited by the Union and Board as supporting the argument that Williamson's conduct was not sufficiently serious to justify a two-day suspension (Bd.-Br. 37, Un.-Br. 31) involve discharges. The Union's brief incorrectly states that Consolidated terminated Williamson.

III. IN ADDITION TO MISAPPLYING THE LAW, THE ORDER'S CONCLUSIONS REGARDING HUDSON ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In addition to the repeated failures to apply established law, which alone warrants non-enforcement, a Board's order should not be enforced where its findings are not supported by substantial evidence. *Tradesmen* at 1141. While the Board's findings are generally entitled to respect, '"they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.' Thus, 'a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.'" *Epilepsy Foundation v. NLRB*, 268 F.3d 1095, 1103 (D.C. Cir. 2001) (*quoting Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 490 (1951)) (citations omitted).

As set forth more fully in Consolidated's Principal Brief, many of the Board's key findings are not supported by substantial evidence, particularly when considering the opposing body of evidence. Indeed, some key findings are not supported by any evidence whatsoever. Despite the Board's and Union's briefs' attempts to weave stories purportedly supporting the Order's strained findings in

the hopes of convincing this Court that substantial evidence exists supporting enforcement, the Order is not supported by substantial evidence.

A. The Board's Order Disregarding Conley's Testimony Is Not Supported By Substantial Evidence

The Board presumed Conley was biased simply because he is a Company manager and rejected his testimony on the additional grounds that it was self-serving and that he was "likely to have been angry about the fact that Hudson and Weaver were following him." JA 07. There is no evidence, let alone substantial evidence, to support this finding. Indeed, the only question posed during the hearing as to whether Conley was mad was to Diggs, who testified that he did not remember Conley being mad. JA 597. To hold that testimony is biased without any evidence (and actually contrary to the only evidence) simply because the witness is a manager is clear error and would put an employer in a similar disadvantage in any employment case.

The Board's brief attempts to downplay and detach the Order from the ALJ's clearly improper conclusions regarding Conley. Bd.-Br. 33 n.7. However, the ALJ's unsupported presumptions of bias by Conley clearly were a vital aspect of the ALJ's decision adopted by the Board, and the attempted detachment cannot cure this defect. *See Detroit Newspaper Agency* at 311 ("we must accept the Board's decision on its own terms").

B. Substantial Evidence Cannot Be Created, Supported, or Found Based Upon The Union's Post-Hoc Rationalizations And Misstatements Of The Evidence

No evidence, let alone substantial evidence, exists to support the reality of the Order: seven people (Conley, Diggs, Rankin, Greider, Rich, Walters, and Dasenbrock) who work different jobs in different locations and were in different places on December 10 each believed that Hudson engaged in conduct that is intimidating and coercive, but none of their testimony was given virtually any weight. For instance, it is obvious from the Order that the assumptions of anger (in evaluating Conley, holding that "Conley is likely to have been angry"), ill-will (finding testimony of Greider and Rich as to Hudson's conduct "solely the result on their animus towards Hudson") and that they were upset (holding that Rich and Walters were upset and disregarding their testimony as to the Rankin incident) played a critical role in discounting their testimony. *See* JA 06-07, 10. However, there was no evidence to support the assumptions that Conley, Greider, Rich, or Walters were angry or upset about the strike, harbored ill-will against Hudson, or had any other reason to provide false testimony (indeed, Rich is friends with Hudson (JA 685)).

In light of the Order's lack of actual evidence versus unsupported assumptions, the Union offers its versions for what occurred as substitutes for competent substantial evidence. In so doing, the Union supports its versions with

evidence not relied upon in the Order and in some cases contradicted by the record.[12]

Although Consolidated cannot respond to all of these instances given word limit constraints, as to the Conley incident, the Union claims that Hudson and Weaver "consistently testified what they were doing, where they were when they passed [Conley], and how fast they were going." Un.-Br. 25. Notably, the Union provides no record cites in support, as Hudson and Weaver did not give consistent testimony. For example: a) Weaver testified she passed Conley close to Loxa Road, while Hudson testified that Weaver passed Conley near the airport (JA 401, 481), which are a half mile apart (JA 08); b) Weaver and Hudson contradicted themselves by a full mile as to where Conley turned off (*see* JA 427, 482-483; *see also* JA 20, 89, 170, ,); c) Weaver acknowledged that several cars piled up behind them after Hudson started driving in front of Conley (JA 419, 436); Hudson, meanwhile, testified that there was no congestion or backup (JA 515-516); and d) while Hudson claimed on multiple occasions that she pulled in between Weaver and Conley prior to Conley turning off (JA 482, 484, 516, 519), Weaver did not testify that Hudson ever pulled between them, and in fact, her testimony indicates

[12] Consistent with this attempt, the Union accuses Greider, the target, of overreacting, despite the fact that a friend of Hudson's that viewed the event thought Hudson's conduct was so egregious that she immediately texted her, stating, "I just saw what Pat Hudson did to you. I can't believe she did that." JA 653, 685-691.

that Hudson was either beside Conley or just next to Weaver in the left lane at the time Conley pulled off (JA 404, 421-423).

The Union also misleadingly asserts that Conley admitted that Hudson could have thought it was safe to move into the left lane. Un.-Br. 9. Obviously, Conley cannot get inside of Hudson's head, and recognizing this, testified that while Hudson "could have or could not have" thought it was safe, he would be surprised if she thought it was safe. JA 556.

Similarly, the Union states that Diggs (from Texas) "admitted that Hudson and Weaver could have been driving the speed limit" (Un.-Br. 23), but ignores his testimony "they were traveling much slower than everyone else[,]" and "I don't even know what the speed limit is out there." JA 597. The Union further alleges that Diggs testified there was no danger of Conley hitting Hudson's car. Un.-Br. 25. But, Diggs testified that if Conley had not been paying attention, "he would have hit her." JA 595.[13]

As to the Greider incident, the Union asserts that neutral employee Rich agreed that 17th Street was like a grocery store parking lot (Un.-Br. 4) (which in the Union's view apparently justifies Hudson starting and stopping while driving down 17th Street even though no one was in front of her), but the Union omits Rich's testimony that in her opinion Hudson was not driving cautiously as though she was

[13] Diggs also testified that at one point, he looked back, because he was concerned about getting into an accident. JA 592.

in a shopping center, but rather was driving to keep Greider from proceeding. JA 711-712.

Similarly, the Union suggests that the strikers behaved orderly during Chief Branson's visit and did not impede traffic. Un.-Br. 4. In fact, Chief Branson testified precisely the opposite (JA 363-365, 369-372, 373-378, , 383), and even Union representative Beisner admitted that strikers were in and obstructing the driveway at the Rutledge facility. JA 217-218 .[14]

The serious issues with the Order's analysis and application of the evidence are not mere credibility determinations, as the Union and Board would have this Court believe, but rather unwarranted disregard and misapplication of the record. The Court should not allow these deficiencies to be remedied through post-hoc explanations and twisting of evidence. *See Detroit Newspaper Agency* at 311.

[14] The Union's brief makes several references to the strike line video, JA 87. Consolidated invites the Court to review the video. The video demonstrates the chaotic conditions and numerous instances of impeding described by the Chief Branson, which is relevant contextual evidence. The video shows small portions of the particular incidents in question, as it captured only footage of the driveway and immediate areas, a point the Union's brief repeatedly ignores in its descriptions of the incidents. As such, the video captures a fraction of the Greider incident, JA 87 at 10:03:41; JA 166, 651, 660-661. Although the video covers only 16 seconds of the incident, it indicates, consistent with Greider's and Rich's testimony, that Hudson applied her breaks in front of Greider. *See* JA 87 at 10:03:41. The Rankin footage similarly shows Hudson's vehicle inexplicably breaking. *See* JA 87 at 11:36:16.

IV. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE FINDING THAT MAXWELL'S SUSPENSION VIOLATED THE ACT

The Board's brief claims that the testimony of Fetchak (a subpoenaed, out-of-state, non-managerial witness whose credibility was not challenged in the Order) does not materially contradict Maxwell's account. Bd.-Br. 21. This is a stunning assertion, as no rational reader could read Fetchak's testimony and believe that it is materially consistent with Maxwell's account. Fetchak's testimony indicates that Maxwell, among other things, refused to move out of the way, intentionally placed a part of his arm on the vehicle's front in an effort to impede the its progress as it attempted to turn onto a public road, was the aggressor during the encounter, and approached Flood, gave him the middle finger, and yelled, "Fuck You, Scab." JA 569-574, 577-578, 587-588. Obviously, Maxwell's testimony, in which he absolved himself of any wrongdoing and claimed that the van hit him twice, is completely divergent of Fetchak's testimony.

Under the burden-shifting framework, if any doubt exists between two witnesses, it must be resolved against the GC, who has the burden of proof and failed to call any of the other six or more striker witnesses to support Maxwell's account. *See, e.g., Axelson* at 864. As there is no evidence or other reason to dispute Fetchak's veracity (and in fact no party has disputed Fetchak's veracity), his testimony should have been applied.

The cases cited by the Board for the proposition that Maxwell's conduct was not sufficiently serious to lose protection of the Act are discharge cases. Maxwell was only suspended for two days. But, Board decisions have sanctioned discharges on similar cases and most certainly support his lesser discipline. *See Siemens* at 1176; *Calmat Co.*, 326 NLRB 130, 135 (1998); *GSM* at 174-75; *see also Auto Workers Local 695 (T.B. Wood's)*, 311 NLRB 1328, 1336 (1993); *Teamsters Local 812 (Pepsi-Cola Newburgh)*, 304 NLRB 111, 115-17 (1991).

V. THE BOARD CANNOT CURE ITS FAILURE TO ENGAGE IN THE REQUIRED ANALYSIS AS TO THE SECTION 8(A)(5) ALLEGATION BY CLAIMING THAT THE ISSUE WAS "STRAIGHTFOWARD" AND DID NOT NEED ANALYSIS

As set forth in Consolidated's Principal brief, the ALJ declined to rule on the Section 8(a)(5) allegation. JA 11. The Board's and Union's briefs assert that the Order was supported by substantial evidence and law, and the Board's brief goes so far as to characterize Consolidated's conduct as a "straightforward violation." Bd.-Br. 43. But, it cannot be disputed that the Order did not articulate any evidence nor give any reasoning in support of finding a violation.

"Without a clear presentation of the Board's reasoning, it is not possible for [the Court] to perform our assigned reviewing function and to discern the path taken by the Board in reaching its decision." *Point Park Univ. v. NLRB*, 457 F.3d 42, 50 (D.C. Cir. 2006). While the Board and Union provide post-hoc rationalizations for the Board's finding, neither can supply reasons that the Board

did not itself offer in its decision. *Detroit Newspaper Agency* at 311. Accordingly, the finding of a Section 8(a)(5) violation must not be enforced. *See Point Park* at 50-52; *Sutter East Bay Hosps.*, 687 F.3d 424, 437 (D.C. Cir. 2012) (holding that the Board did not meet its analytical burden where it failed to provide any analysis or explanation for its conclusion).

It is not surprising that the Order did not provide any reasoning, because even if the Board had attempted to meet its analytical burden, no violation occurred. Contrary to the Board's and Union's briefs' arguments that Weaver's position was eliminated (Bd.-Br. 42, Un.-Br. 35), the parties stipulated that Weaver's position of Office Specialist was never "eliminated" and that Consolidated continues to employ Office Specialists in the bargaining unit. JA 53-58 (Joint Stipulations) ¶¶ 5, 8, 9.

Further, the evidence demonstrates that Consolidated did not refuse to bargain. It is uncontested that Consolidated responded and agreed to the Union's request to bargain concerning the assigning of Weaver's former duties. JA 53-58 ¶¶ 13, 14; JA 149-150, 151-165.

The Order failed to articulate any reasoning for its determination and cannot stand. Even if engaged in the proper analysis, substantial evidence does not exist to support a finding of a violation.

VI. CONCLUSION

For all the foregoing reasons, and for all of the reasons set forth in Consolidated's Principal Brief, Consolidated respectfully requests the Court grant its Petition for Review and vacate the Order in all respects.

Respectfully submitted, this 22nd day of June, 2015.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,869 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font and Times New Roman style.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of June, 2015, I caused the foregoing document to be filed with the Clerk of the United States Court of Appeals for the District of Columbia using the CM/ECF system which will send notification of such filing to the following:

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